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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re: FLORELEE MONZON, Debtor.	Case No. 09-20197-lbr Chapter 13
	Hearing Date: September 10, 2009 Hearing Time: 3:30 p.m.

**MOTION TO VALUE COLLATERAL, "STRIP OFF" AND MODIFY RIGHTS OF
UNSECURED CREDITORS PURSUANT TO 11 U.S.C. § 506 (a) AND §1322**

TO: THE HONORABLE BANKRUPTCY JUDGE LINDA B. RIEGLE:

FLORELEE MONZON (hereinafter referred to as “Debtor”), by and through her attorneys COLEMAN LAW ASSOCIATES, A PROFESSIONAL LAW CORPORATION, move this Court pursuant to 11 U.S.C. §506(a) AND §1322, and Bankruptcy Rules 3012 and 9014 of the Federal Rules of Bankruptcy Procedure to value collateral securing certain residential loans and re-classify lenders’ claims as unsecured and in support of the Motion state:

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157.

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STATEMENT OF FACTS

1. Debtor filed a Voluntary Petition under Chapter 13, Title 11, of the United States Code, Case Number 09-20197-lbr on June 15, 2009.

2. On the petition date, Debtor owned one (1) residential property listed on Exhibit "A" hereto and known as:

A.) 32 East Serene Avenue, #216, Las Vegas, Nevada 89123.

3. On the petition date, the estimated value of the property was ONE HUNDRED TWENTY THOUSAND DOLLARS \$120,000.00, however, the appraised value is ONE HUNDRED FIFTEEN THOUSAND DOLLARS (\$115,000.00), as set forth on Exhibit "B", attached herein and incorporated for reference.

4. At the time of filing the petition, the property was subject to the following
liens:

A.) U.S. BANK HOME MORTGAGE, ACCOUNT ENDING IN **9083**, (First Mortgage and/or First Deed of Trust): THREE HUNDRED SEVENTY-TWO THOUSAND, SEVEN HUNDRED THIRTY-EIGHT DOLLARS (\$372,738.00).

B.) WELLS FARGO BANK, N.A., ACCOUNT ENDING IN **6410**, (Second Mortgage and/or Second Deed of Trust): TEN THOUSAND FOUR HUNDRED FOURTEEN DOLLARS AND ZERO CENTS (\$10,414.00).

MEMORANDUM OF POINTS AND AUTHORITIES

5. Section 506(a)(1) of the Bankruptcy Code provides that a Chapter 13 Debtor may bifurcate a secured lender's claim into an allowed secured claim and an allowed unsecured claim based upon the actual value of the property securing such lender's lien.

1 An allowed claim of a creditor secured by a lien on property in
 2 which the estate has an interest, or that is subject to setoff under
 3 section 553 of this title, is a secured claim to the extent of the
 4 value of such creditor's interest in the estate's interest in such
 5 property, or to the extent of the amount subject to setoff, as the
 6 case may be, and is an unsecured claim to the extent that the
 7 value of such creditor's interest or the amount so subject to
 8 setoff is less than the amount of such allowed claim. Such value
 9 shall be determined in light of the purpose of the valuation and
 10 of the proposed disposition or use of such property, and in
 11 conjunction with any hearing on such disposition or use or on
 12 a plan affecting such creditor's interest.

13 11 U.S.C. § 506 (a)(1)

14 6. The Supreme Court has recognized that Section 506 of the Bankruptcy Code defines
 15 the amount of the secured creditor's allowed secured claim and the conditions of his receiving post-
 16 petition interest. United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S.
 17 365, 371 (1988). In United Sav. Ass'n of Texas, the Supreme Court interpreting Section 506(a) of
 18 the Bankruptcy Code found that:

19 In subsection (a) of this provision the creditor's "interest in
 20 property" obviously means his security interest without taking
 21 into account of his right to immediate possession of the
 22 collateral on default. If the latter were included, the "value of
 23 such creditor's interest" would increase, and the proportions of
 24 the claim that are secured and unsecured would alter, as the stay
 25 continues since the value of the entitlement to use the collateral
 26 from the date of bankruptcy would rise with the passage of
 27 time. No one suggests this was intended. The phrase "value of
 28 such creditor's interest" in § 506(a) means "the value of the
 collateral."

See id. (emphasis added) (quoting H.R. Rep. No. 95-595, pp. 181, 356 (1977)).

7. The Ninth Circuit agrees with this interpretation of Section 506 of the Bankruptcy
 8 Code. In re Maldonado, 46 B.R. 497, 499 (9th Cir. BAP 1984) (interpreting section 506(a), "a claim
 9 is a secured claim to the extent of the value of [the] creditor's interests in the estate's interest in the
 10 property. The entire claim is not a secured claim. The claim is secured only to the extent of the value
 11 of such creditor's interest.").

1 of the secured interest.”)

2 8. In addition, this Bankruptcy Court has found that “an “allowed secured claim” is a
 3 determination generally made under 11 U.S.C. § 506.” In re BBT, 11 B.R. 224, 229 (Bankr.D. Nev.
 4 1981). The Bankruptcy Court further stated that, with respect to a claim secured by a lien on property
 5 of the estate, “to the extent that the value of the property is less than the amount of the total allowed
 6 claim, **the claim is unsecured.**” Id. (emphasis added). Thus, pursuant to the law of this Circuit, the
 7 amount of the allowed secured claim cannot exceed the market value of the property and the
 8 remainder of the claim must be treated as an allowed unsecured claim for the purposes of the plan.

9 9. Moreover, the Ninth Circuit Court of Appeals has also found that a wholly unsecured
 10 lien holder’s claim can be modified and reclassified as a general unsecured claim pursuant to section
 11 506 (a) of the Bankruptcy Code. See In re Zimmer, 313 F.3d 1220 (9th Cir.2002),
 12 Specifically, the Court held:

13 Section 506(a) divides creditors’ claims into “secured claims”
 14 and “unsecured claims.” Although the conventional
 15 interpretation of “secured” might include any claim in which
 16 the creditor has a security interest in the debtor’s property,
 17 §506(a) makes clear that the status of a claim depends on the
 18 valuation of the property:
 19

20 “An allowed claim of a creditor secured by a lien on property in
 21 which the estate has an interest ... is a secured claim to the
 22 extent of the value of such creditor’s interest in the estate’s
 23 interest in such property ... and is an unsecured claim to the
 24 extent that the value of such creditor’s interest ... is less than the
 25 amount of such allowed claim.”

26 11 U.S.C. 506(a). To put it more simply, a claim such as a
 27 mortgage is not a “secured claim” to the extent that it exceeds
 28 the value of the property that secures it. Under the Bankruptcy
 Code, “secured claim” is thus a term of art; not every claim that
 is secured by a lien on a property will be considered a “secured
 claim.” Here, it is plain that PSB Lending’s claim for the
 repayment of its loan is an unsecured claim, because its deed of
 trust is junior to the first deed of trust, and the value of the loan
 secured by the first deed of trust is greater than the value of the
 house.

In re Zimmer, 313 F.3d at 1222-23.

2 10. Accordingly, because the second mortgage on the property is wholly unsecured in that
3 there is no equity above the first mortgage, as set forth in Exhibit B, WELLS FARGO BANK N.A.'s
4 unsecured claim (Second Mortgage and/or Second Deed of Trust; ACCOUNT ENDING IN **6410**)
5 should be reclassified as a general unsecured claim to be treated pro rata with similar unsecured
6 creditors and WELLS FARGO BANK, N.A. should be stripped of its secured rights under 11 U.S.C.
7 506 (a) since no maintainable security interest in the subject Property exists.

8 11. Moreover, because the first mortgage on the property is under secured, U.S. BANK
9 HOME MORTGAGES' claim (First Mortgage and/or First Deed of Trust; Account No. **xxxxxx9083**)
10 should be bifurcated into secured and unsecured claims based on the market value of the Property as
11 shown in the appraisal as set forth in Exhibit "C".

12 Finally, the filing of a motion rather than an adversary proceeding to achieve the
13 relief requested herein is appropriate in this Court. See In re Bonsignori, Case No. BKS-08-11830-
14 LBR (D. Nev. June 25, 2008) (approving the stripping off of an unsecured lien by motion); See also
15 In re Williams, 166 B.R.615 (Bankr.E.D.Va.1994); In re Fuller, 255 B.R. 300
16 (Bankr.W.D.Mich.2000); In re Hoskins, 262 B.R. 693 (Bankr.E.D.Mich.2001); In re King, 290 B.R.
17 641 (Bankr.C.D.Ill.2003); In re Millspaugh, 302 B.R. 90 (Bankr.D.Idaho 2003); Dickey v. Ben. Fin.
18 (In re Dickey) 293 B.R. 360 (Bankr.M.D.Pa.2003); In re Hill, 304 B.R. 800 (Bankr.S.D. Ohio 2003);
19 In re Sadala 294 B.R. 180 (Bankr.M.D.Fla.2003); In re Fisher, 289 B.R. 544 (Bankr.W.D.N.Y.2003);
20 In re Robert, 313 B.R. 545 (Bankr.N.D.N.Y.2004); In re Fuller, 225 B.R. 300 (Bankr. W.D. Mich.
21 2000); and In re Bennett, 312 B.R. 843 (Bankr.W.D.Ky.2004). Instead, Debtor may bring the instant
22 motion.

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CONCLUSION

2 13. Bankruptcy law is clear; absent sufficient equity in the Properties, the mortgage
3 lenders' claims, which are only partially secured (excluding Debtor's Primary Residence) should be
4 bifurcated into secured and unsecured claims. The second mortgage lenders, who are wholly
5 unsecured, should receive only their pro rata distribution with other general unsecured creditors
6 through the Debtor's Chapter 13 plan.

7 || **WHEREFORE**, Debtor prays that this Court:

8 1. Valuate the Property in accordance with the appraisals attached hereto;

9 2. Order the monthly Principal and Interest payments due to U.S. BANK HOME

10 MORTGAGE on the reduced value of collateral security in the amount of ONE HUNDRED

11 FIFTEEN THOUSAND DOLLARS (\$115,000.00) as a secured claim, be adjusted and lowered

12 accordingly;

13 3. Avoid, "strip off", and extinguish WELLS FARGO BANK, N.A. (Second

14 Mortgage and/or Second Deed of Trust; ACCOUNT ENDING IN **6410**) as a wholly unsecured

15 second lien pursuant to section 506(a) of the Bankruptcy Code;

16 4. Reclassify WELLS FARGO BANK, N.A.'s (Second Mortgage and/or Second Deed

17 of Trust; ACCOUNT ENDING IN **6410**) claim as a general unsecured claim to be paid pro rata with

18 other general unsecured creditors through the Debtor's Chapter 13 plan; and

19 5. Such other relief the Court deems just and proper.

20 || DATED this 7th day August, 2009.

COLEMAN LAW ASSOCIATES, APLC

By: /s/ C. Andrew Wariner
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1 **LIST OF EXHIBITS**
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3 **EXHIBIT A:**
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5 PROPERTY INFORMATION
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7 **EXHIBIT B:**
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9 **RESIDENTIAL APPRAISAL REPORT**
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11 Florelee Monzon
12 Case Number 09-20197-lbr
13 32 E. Serene Avenue, #216
14 Las Vegas, NV 89123
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